

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**ORIGINAL**

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 13 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of )  
Commission's Equal )

Employment Opportunity Rules )

) MM Docket No. 94-34

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

Respectfully submitted,

**NATIONAL ASSOCIATION OF  
BROADCASTERS**

1771 N Street, N.W.  
Washington, D.C. 20036

Henry L. Baumann  
Steven A. Bookshester  
Terry L. Etter

Counsel

Dwight Ellis  
Vice President, NAB Human Resource Development

Mark R. Fratrik, Ph.D.  
Vice President, Economist  
NAB Research & Planning

June 13, 1994

No. of Copies rec'd  
List A B C D E

11

2  
**TABLE OF CONTENTS**

<b>Executive Summary</b>	<b>i</b>
<b>I. INTRODUCTION</b>	<b>1</b>
<b>II. MANY OF THE PROPOSALS ADDRESSED IN THE NOTICE HAVE NO NEXUS TO THE BASIS FOR THE COMMISSION'S EEO ENFORCEMENT</b>	<b>5</b>
<b>III. BY PLACING UNDUE EMPHASIS ON PROCESS AND GIVING LITTLE RECOGNITION TO RESULTS, THE COMMISSION HAS MADE THE PRIMARY PURPOSE OF AFFIRMATIVE ACTION — THE HIRING OF WOMEN AND MINORITIES — A SECONDARY FUNCTION.</b>	<b>8</b>
<b>IV. THE COMMISSION SHOULD PROVIDE RELIEF FOR SMALL BROADCASTERS, THE VAST MAJORITY OF WHOM HAVE FEW EMPLOYEES AND LIMITED RESOURCES.</b>	<b>12</b>
<b>A. Broadcasters in Small Markets Experience Difficulties in Attracting and Retaining Qualified Personnel, Including Minorities.</b>	<b>13</b>
<b>B. Small Operations in Larger Communities Also Have Problems Competing for Qualified Personnel.</b>	<b>16</b>
<b>V. THE COMMISSION SHOULD ENCOURAGE BROADCASTERS TO CONDUCT JOINT RECRUITMENT EFFORTS AND INDUSTRY-SPONSORED EMPLOYMENT SERVICES.</b>	<b>20</b>
<b>VI. THE COMMISSION'S ENFORCEMENT PROCEDURES REGARDING PROMOTION AND RETENTION OF MINORITY AND FEMALE EMPLOYEES ARE ADEQUATE.</b>	<b>24</b>
<b>VII. CHANGES TO THE RENEWAL APPLICATION, ANNUAL EMPLOYMENT REPORT AND INQUIRY PROCEDURES, AS DISCUSSED IN THE NOTICE, ARE UNNECESSARY AND WOULD NEEDLESSLY ADD TO THE PAPERWORK BURDEN SHOULDERED BY BROADCAST LICENSEES.</b>	<b>27</b>
<b>A. The Suggested Changes to the EEO Program Report Would Greatly Increase the Paperwork Burden on Licensees, But Provide Little Benefit.</b>	<b>27</b>
<b>B. Breaking "Officials and Managers" into Seven Job Categories Would Not Provide the Commission with Any More Information Than It Currently Receives.</b>	<b>30</b>

C.	<b>Inquiring into the Hiring Opportunities of the Last Three Years of the License Term — Combined with the Annual Employment Reports of the Entire License Term — Should Provide the Commission an Adequate View of a Licensee's EEO Efforts, and Would Be Consistent with Even the Most Stringent Employment-Related Recordkeeping Requirements of Other Agencies.</b>	31
D.	<b>The Commission Should Maintain Its EEO Focus on Employment and Refrain from Becoming Involved in Licensees' Other Business Activities.</b>	33
VIII.	<b>THE COMMISSION SHOULD ELIMINATE RECORDKEEPING FOR PART-TIME HIRES.</b>	34
IX.	<b>CONCLUSION</b>	35

#### **APPENDIX A:**

**Selected Portions of the 1992 Radio Employee Compensation & Fringe Benefits Report**

## EXECUTIVE SUMMARY

Because the Commission takes its authority to regulate EEO from the Communications Act, there must be a nexus between advancing equal employment opportunities within the broadcasting industry and the Commission's role in regulating the industry. The Commission has long recognized that it has a limited role in EEO enforcement: that of assuring *on an overall basis* that licensees' employment practices are compatible with their obligation to program in the public interest. The essential function of the Commission's EEO initiative, therefore, has been to ensure that licensees hire women and minorities so that their viewpoints are adequately represented in licensees' programming.

Yet, when the Commission reviews licensees' EEO programs, the results achieved by licensees have recently become secondary to the efforts they must put forth in recruiting women and minorities. The Commission should put results on at least the same plateau as efforts.

The broadcasting industry has achieved considerable success in providing employment opportunities for women and minorities. Women hold 90 percent of the new broadcasting jobs created since 1975; minorities, over 40 percent. The industry employs women at 87 percent of parity overall and 75 percent in the upper four job categories. Employment of minorities is over 80 percent of parity overall and 55 percent in upper four jobs. In most respects, representation of women and minorities in broadcast positions mirrors their presence in the general labor force.

The expanded reporting, efforts and recordkeeping discussed in the *Notice* are, therefore, unwarranted and would needlessly increase the paperwork burden on licensees.

- The Commission would receive little benefit from making seven categories of reporting from the current "Officials and Managers" category on the Annual Employment Report.
- Requiring licensees to provide detailed information on each hiring opportunity reported at renewal on the EEO Program Report would force each licensee to compile the same information now provided by only those licensees whose EEO programs are deemed inadequate. Considering that 96 percent of licensees' EEO programs pass Commission inspection, the miniscule benefit that might be derived from this exercise would be far outweighed by the increased paperwork burden on licensees and the further consumption of Commission resources.
- The notion that licensees should be required to encourage female and minority entrepreneurs to conduct business with their operations has been previously considered and rejected by both the Commission and Congress. Such a requirement is unnecessary and bears little relationship to the statutorily-based purpose of the Commission's EEO initiative — to ensure that women and minorities are integral parts of licensees' programming decisions.
- The Commission's current inquiry procedures provide the Commission with an adequate picture of licensees' EEO efforts. Requiring hiring records for more than the last three years of the license term and expanding use of on-site audits would be a needless expenditure of Commission and licensee resources.

Small market broadcasters and small broadcasters in other markets must be provided recordkeeping relief. The Commission should develop a definition of "small market" similar to the statutory definition for the exemption from overtime for certain employees,

generally a station located outside a Metropolitan Statistical Area, inside an MSA of less than 100,000 population, or in a community of less than 25,000 population more than 40 miles from the central city of the MSA. These broadcasters have considerable difficulty in attracting and retaining qualified employees, due to low wages, minimal benefits and location in communities with few amenities. Small broadcasters (i.e., those with fewer than 15 employees) in other markets have similar problems. Small market broadcasters, and small broadcasters whose labor force contains less than ten percent minorities, should be relieved of detailed recordkeeping requirements if they have no history of discrimination. The Commission should also give small broadcasters greater latitude in the use of alternative labor force data.

The Commission should also encourage joint recruitment efforts (e.g., employment clearinghouses and job fairs) by broadcasters. Such efforts have been discounted as "general sources" by the Commission in reviewing licensees' EEO efforts. Though not minority-specific, they nevertheless consume more licensee time and effort than merely placing an ad in a trade magazine or newspaper, and show the licensee's willingness to reach out to its community and attract qualified women and minorities. The Commission should recognize these activities as licensees' good faith efforts to comply with the EEO rules, and give them more weight than general sources.

Current enforcement efforts regarding promotion and retention of minorities and women are adequate in providing the Commission with a general overview of each licensee's employment picture. Such information would be largely used to detect discrimination. Because there are already ample avenues for an individual to pursue a complaint, which would be reported to the Commission, additional reporting requirements would needlessly burden licensees.

The Commission should also not require recordkeeping for part-time hires. Undue recordkeeping burdens in this area serve as a disincentive to licensees in hiring part-time workers.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

RECEIVED

JUN 13 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of ) MM Docket No. 94-34  
Commission's Equal )  
Employment Opportunity Rules )

**COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

**I. INTRODUCTION**

The National Association of Broadcasters ("NAB")<sup>1</sup> hereby submits its Comments in response to the Commission's *Notice of Inquiry* ("Notice")<sup>2</sup> in the above-captioned proceeding. To fulfill a Congressional mandate,<sup>3</sup> the Commission has begun an inquiry regarding the effectiveness of its EEO rules for broadcast, cable and multichannel video programming distributors. Among other things, the Commission is seeking comment on:

1) Whether its EEO rules should be modified for small market broadcasters, in light of the unique difficulties they have in attracting and retaining minority employees. The Commission also asks how "small market" broadcasters should be defined and identified.

---

<sup>1</sup> NAB is a nonprofit, incorporated trade association which serves and represents America's radio and television stations and networks.

<sup>2</sup> *Notice of Inquiry* in MM Docket No. 94-34, FCC 94-103, adopted April 20, 1994, released April 21, 1994.

<sup>3</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 22(g), 106 Stat. 1460, 1500 (1992).

2) Whether it should eliminate the requirement for documentation of part-time hires. Alternatively, the Commission inquires as to the level of consideration which should be given part-time hires, in light of the Commission's focus on fulltime hires and employment.

3) Whether broadcasters should be required to encourage minority and female entrepreneurs to conduct business with all parts of station operations.

4) Whether the Commission should modify its EEO enforcement policies in the areas of the promotion and retention of female and minority employees.

5) Whether the Commission should encourage joint recruitment efforts by station licensees in particular cities or regions.

6) The costs and benefits of the Commission's entire EEO regulatory program, asking how burdens might be reduced without causing a decrease in the effectiveness of the Commission's EEO rules and policies.

7) Whether the EEO Program Report (FCC Form 396) should be revised in order to elicit greater information on the promotion of part-time personnel to fulltime status, as well as on licensees recruitment and hiring efforts, during the 12-month period before filing for renewal.

8) Whether the Annual Employment Report (FCC Form 395-B) should be expanded to seek information on 15 job categories, as Congress has mandated for cable, rather than the current nine job categories.

The general tenor of the *Notice*, with emphasis on more-detailed reporting requirements and expansion of licensees' EEO programs, conveys the sense that the broadcasting industry has somehow been lax in its efforts to provide equal employment opportunities for women and minorities. NAB believes that the record dispels that notion, and reaffirms the commitment of the broadcasting industry to provide equal employment opportunities for women



and minorities. The presence of minorities in broadcasting industry jobs rose from 16.8 percent in 1988 to 18.2 percent in 1992. The percentage of minority officials and managers in the same time period increased from 10.9 to 12.5 percent. At the same time, the female presence climbed from 38.3 percent to 39.5 percent, with an increase in officials and managers from 31.2 percent to 33.8 percent.<sup>4</sup> Compared to 1992 national labor force figures of 22.5 percent minority and 45.4 percent female,<sup>5</sup> minorities in broadcast occupations represent over 80 percent of parity overall, and 55 percent of parity in officials and managers. For females, broadcasters are at approximately 87 percent of parity overall and 75 percent of parity in officials and managers. These results were achieved despite a 16 percent drop in total broadcast employment from 1988 to 1992.<sup>6</sup>

Moreover, for minorities broadcasting industry employment is comparable to that in the nation as a whole. The national workforce statistics for 1990 show minorities at approximately 60 percent of parity for officials and managers, 75 percent for professionals, 90 percent for technicians and 80 percent for sales workers.<sup>7</sup> The broadcasting industry figures for 1992 show 55 percent of parity for officials and managers, 76.9 percent for professionals, 97.8 percent for technicians and 53.8 percent for sales. For women, the national labor force is at 80 percent of parity in officials and managers, 95 percent for technicians and just short of 120 percent of parity for professionals and sales workers. The broadcasting industry is at 75 percent of parity in officials and managers, 72 percent for professionals, 31 percent for technicians and

---

<sup>4</sup> See Notice, *supra* note 2, ¶ 15.

<sup>5</sup> See Public Notice, 1992 Broadcast and Cable Employment Report, released July 6, 1993.

<sup>6</sup> *Id.*

<sup>7</sup> See Brown, Warren A., "How to Write an Affirmative Action Plan," American Demographics 56, 58 (March 1993).

4

109 percent for sales workers. The disparity in the figures for professionals and technicians may be attributable to the fact that these categories in the national labor force contain many computer and medical related jobs which are not found in broadcasting, and that these were two of the top three upper-four categories in broadcasting jobs lost since 1988.

Thus, the broadcasting industry as a whole is not only performing above Commission EEO guidelines, it generally reflects the status of the national labor force. Radical changes in EEO programs and enforcement are unwarranted.

In these Comments, NAB urges the Commission to provide relief for small market broadcasters and small broadcasters in other markets. These stations generally lack the financial and personnel resources necessary to maintain the paperwork associated with the Commission's recruitment-based EEO requirements. NAB recommends that the Commission relieve these stations from detailed recordkeeping requirements, so long as there is no history of discrimination.

In addition, NAB urges the Commission to refrain from adding to the paperwork burden of all broadcast licensees. Although 96 percent of broadcasters' EEO efforts pass muster with the Commission,<sup>8</sup> the *Notice* seeks comment on whether the Commission should demand additional information regarding licensees' EEO efforts. The expanded reporting requirements discussed in the *Notice* are similar to the remedial reporting conditions placed on licensees with deficient EEO programs. Their adoption would harness *all* licensees with extensive additional costs and paperwork burdens, with little resulting benefit. In particular, expanding the Annual

---

<sup>8</sup> See *Notice*, *supra* note 2, ¶ 14. This is an improvement from the late 1970s. At that time, roughly 40 percent of stations passed initial review, and 80 percent of the remaining 60 percent (or 48 percent of all stations) passed the in-depth review. Thus, 88 percent of stations passed the Commission's EEO scrutiny. See *EEO Processing Guidelines*, 79 F.C.C.2d 922, 924 (1980).

Employment Report categories and increasing the information required at renewal time are needless and unjustified propositions.

NAB also encourages the Commission to help foster development of joint recruitment efforts by licensees. When reviewing licensees' EEO efforts, the Commission should not discount, as "general" sources, activities such as job fairs and employment clearinghouses. Moreover, the Commission should recognize the good faith efforts of licensees who participate in broadcast-related EEO seminars and demonstrate other efforts at ensuring compliance.

## **II. MANY OF THE PROPOSALS ADDRESSED IN THE NOTICE HAVE NO NEXUS TO THE BASIS FOR THE COMMISSION'S EEO ENFORCEMENT.**

The Commission's authority to regulate broadcast licensees' EEO programs is drawn from the Communications Act of 1934, not Title VII of the Civil Rights Act.<sup>9</sup> Because the Commission's EEO regulatory authority stems from its enabling statute, there must be a nexus between advancing equal employment opportunities in the broadcast industry and the Commission's purpose in regulating the industry.<sup>10</sup> A broad "public interest" obligation does not suffice. The regulations must be based on the Commission's actual mission. The Supreme Court has recognized that the Commission's EEO regulations "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups."<sup>11</sup>

---

<sup>9</sup> See *Sun Mountain Broadcasting, Inc.*, FCC 94-105, adopted April 20, 1994, released April 28, 1994, at 6 n.11.

<sup>10</sup> See *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976). See also *Metro Broadcasting v. FCC*, 497 U.S. 547, 554-55 (1990); *Florida State Conference of Branches of the NAACP v. FCC*, No. 93-1162, slip op. at 2 (D.C. Cir. May 24, 1994).

<sup>11</sup> *NAACP v. FPC*, 425 U.S. at 671 n.7 (emphasis added).

Indeed, the nexus to programming was a focal point when the Commission first considered establishing EEO regulations in 1968. In reaction to the Kerner Report,<sup>12</sup> the Commission called on the broadcast industry to contribute to the fostering of communication between the white and Black segments of society by making greater use of African-American journalists and actors.<sup>13</sup> When the Commission adopted its EEO regulations in 1976, it restated the programming nexus:

We do not contend that this agency has a sweeping mandate to further the "national policy" against discrimination, nor have we sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC. Instead, we have sought to limit our role to that of assuring on an overall basis that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service programming.<sup>14</sup>

Although that *Order* was set aside "insofar as it alters the threshold for stations large enough to be required to submit EEO programs,"<sup>15</sup> the Court reaffirmed the Commission's limited role in EEO enforcement:

EEO enforcement is not the FCC's mission. Thus it had no obligation to promulgate EEO regulations. But it does possess the power to issue such regulations in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community.<sup>16</sup>

The Commission set out to modify its EEO regulations in 1975 in response to a 1974 report issued by the U.S. Commission on Civil Rights. That report praised the Commission

---

<sup>12</sup> *Report of the National Advisory Commission on Civil Disorders* (1968).

<sup>13</sup> *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 774-75 (1968).

<sup>14</sup> *Nondiscrimination in Employment Practices (Broadcast) (Report and Order)*, 60 F.C.C.2d 226, 229-30 (1976) (footnote omitted).

<sup>15</sup> *UCC v. FCC*, 560 F.2d 529 (2nd Cir. 1977).

<sup>16</sup> *Id.* at 531 (citing *NAACP v. Federal Power Commission*, *supra* note 10).

as the only regulatory agency to implement an EEO program for its regulatees, but also criticized the Commission's regulations because they lacked specificity and were not result oriented.<sup>17</sup> And while the Commission recognized that broadcasters must have an ongoing EEO effort, it did not lose sight of the chief purpose of affirmative action — to achieve results:

In its simplest terms, therefore, an affirmative action plan is a set of specific and result oriented procedures which broadcasters must follow to assure that minorities and women are given equal and full consideration for job opportunities.<sup>18</sup>

In 1987, the Commission shifted its EEO emphasis, away from a primarily numbers-oriented system to one which "emphasize[s] licensees' efforts to operate in a nondiscriminatory manner."<sup>19</sup> The Commission's decision focused on two principal concerns: "a licensee's overall EEO efforts rather than simply the numerical composition of its workforce"<sup>20</sup> and "the good faith efforts of licensees to hire and promote in a nondiscriminatory manner."<sup>21</sup>

In order to accommodate this new emphasis, the Commission adopted a two-step EEO review procedure. The Commission first examines the licensee's total EEO picture — its EEO program report, any complaints filed against the station or the licensee, the station's latest Annual Employment Report, the labor force data for the station's area, and any other pertinent

---

<sup>17</sup> *Nondiscrimination of Licensees Employment Practices (Notice of Inquiry and Notice of Proposed Rule Making)*, 54 F.C.C.2d 354, 357 (1975) (citing U.S. Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort — 1974*).

<sup>18</sup> *Id.* at 357-58 (emphasis added).

<sup>19</sup> *In the Matter of Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services (Report and Order)*, 2 FCC Rcd. 3967, 3968 ¶ 8 (1987).

<sup>20</sup> *Id.* at 3967 ¶ 4.

<sup>21</sup> *Id.* at 3973 ¶ 44.

information. If the Commission is satisfied with the licensee's EEO performance, there is no further EEO review. If the initial examination shows the licensee's EEO program to be unsatisfactory, however, the Commission then conducts an in-depth review of the licensee's EEO activities. The Commission preferred this two-step approach as a means to "minimize the overall EEO reporting burden imposed on the broadcast licensees by requiring stations making plainly satisfactory efforts to submit only sufficient information to verify these efforts."<sup>22</sup> In so doing, the Commission acknowledged that "*each licensee must determine the most appropriate means of carrying out its EEO program based on the characteristics of the station and its local service area*"<sup>23</sup> and offered only "examples of the types of activities that would fulfill the EEO requirements."<sup>24</sup> Thus, the *Report and Order* struck a balance between the Commission's desire to probe the details of a licensee's hiring efforts and the licensee's need to maintain those efforts in a manner which provides it with a fair amount of discretion but without onerous paperwork.

**III. BY PLACING UNDUE EMPHASIS ON PROCESS AND GIVING LITTLE RECOGNITION TO RESULTS, THE COMMISSION HAS MADE THE PRIMARY PURPOSE OF AFFIRMATIVE ACTION — THE HIRING OF WOMEN AND MINORITIES — A SECONDARY FUNCTION.**

The Commission has described its EEO requirements as an affirmative action program.<sup>25</sup> However, unlike most affirmative action programs, the broadcast EEO requirements were not implemented to remedy any specifically perceived pattern of discrimination in the

---

<sup>22</sup> *Id.* at 3974 ¶ 49.

<sup>23</sup> *Id.* at 3969 ¶ 16 (emphasis added).

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., 1975 *Notice of Inquiry*, *supra* note 17, at 356.

broadcast industry. Rather, the rules were instituted to further the national policy against employment discrimination based on race, religion, sex or nationality, and to help eradicate the underlying causes of the civil disorders of the mid and late 1960s.<sup>26</sup> Still, as noted *supra*, page 7, the Commission has recognized that the main purpose of an affirmative action program is to achieve results.

Recently, however, the Commission's emphasis on efforts has made the achievement of results a secondary feature of its affirmative action program. The additional recordkeeping proposals raised in the *Notice*, as well as the enforcement actions taken since release of the Commission's February *Policy Statement*,<sup>27</sup> amount to movement away from the balance sought in the 1987 *Report and Order*, and toward a system where process means more than results and the Commission may second-guess licensees' decisions — which have been based on the nature of their local markets — regarding the most appropriate means of carrying out their EEO programs. For example, one licensee, San Luis Obispo Limited Partnership, was recently fined \$25,000 and saddled with a short-term renewal and reporting requirements, even though the station had not discriminated and "hired minorities during the review period at a rate equal to 100% of the minority representation" in its county.<sup>28</sup> The sanctions were levied only because the licensee did not meet the benchmark the Commission had established, albeit after the fact, for licensees' hiring processes — it did not recruit so as to attract minorities (i.e., presumably, use minority-specific sources) for at least 66 percent of its hiring opportunities.

---

<sup>26</sup> See *Memorandum Opinion and Order*, *supra* note 13.

<sup>27</sup> *In the Matter of Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules (Policy Statement)*, FCC 94-27, 9 FCC Rcd. 929 (1994).

<sup>28</sup> *San Luis Obispo Limited Partnership (KKCB/KSLY-FM)*, FCC 94-21, 9 FCC Rcd. 894, 899-900 (1994).

As these Comments have detailed in Section II., the Commission has long based its EEO enforcement on the results that stations achieve in hiring women and minorities. Granted, such an enforcement system could be viewed as establishing a "quota" system.<sup>29</sup> Thus, the Commission instituted the two-step process for EEO review, with emphasis on licensees' efforts. However, in so doing the Commission did not give licensees' efforts the overriding role assigned them by the February *Policy Statement*. Instead, efforts were to become one aspect of the total picture of a licensee's EEO compliance. The Commission would consider "information submitted on the Broadcast EEO Program Report, the Annual Employment Report, any adjudicated findings of discrimination and any further information that [it] might obtain through investigative requests or that the station may provide."<sup>30</sup> However, under the *Policy Statement*, the other aspects of licensees' EEO records — their employment profiles, the absence of discrimination, their efforts at reaching out to their communities through job fairs and internship programs — have been systematically ignored.

NAB's Petition for Reconsideration of the *Policy Statement*<sup>31</sup> presents several reasons why the *Policy Statement* is unfair and inappropriate. We will not reiterate them all here. One of the primary points made in the Petition does bear repeating, however. A licensee who has met or surpassed the Commission's processing guidelines has obviously engaged in sufficient efforts to attract qualified women and minorities. It is illogical to penalize a licensee for not

---

<sup>29</sup> See, e.g., *Report and Order*, *supra* note 19, at 3974 ¶ 50.

<sup>30</sup> *Id.* at 3973-74, ¶ 44.

<sup>31</sup> Petition for Reconsideration and Clarification of the National Association of Broadcasters, *In the Matter of Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, filed March 3, 1994.



jumping through all the FCC-imposed hoops, even though that licensee has achieved the goal of affirmative action — hiring women and minorities.

Moreover, licensees often experience unnecessary delays in hiring qualified individuals, including women and minorities, simply because the licensee is uncertain as to whether the Commission will penalize the station for not conducting a formal recruitment effort. In Comments filed in this docket, Gateway Communications related a situation where it delayed for two weeks the hiring of a minority female for its traffic department in order to contact all of its referral sources.<sup>32</sup> In the meantime, the station needlessly suffered the expense connected with the referral process and overtime for its traffic department employees, as well as the administrative burden (e.g., mistakes in work product and increased pressure on employees) associated with an overworked staff.

By relegating a licensee's hiring results to merely a mitigating factor for assessing fines for EEO violations, thus making results a secondary function of its EEO requirements, the Commission has lost sight of the forest for the trees. NAB urges the Commission to refocus its vision of EEO enforcement by once again placing the results licensees achieve on at least as high a plateau as the efforts they must put forth in recruiting women and minorities. Fundamental fairness demands no less.

In addition, NAB recommends that the Commission review the "three strikes and you're out" EEO enforcement policy recently proposed by Commissioner Quello,<sup>33</sup> or a similar tiered enforcement program. Under the Quello approach, first-time EEO offenders would receive

---

<sup>32</sup> Comments of WOWK-TV, filed May 19, 1994, at 2.

<sup>33</sup> See, e.g., *Lotus Communications, Inc. (KFSD(FM)) and University of Southern California (KUSC(FM))*, FCC 94-107, adopted April 20, 1994, released April 28, 1994 (Concurring Statement of Commissioner Quello).

an admonishment and reporting conditions, second-time violators would be sanctioned with a fine and short-term renewal, and a third offense would result in a large fine or designation for hearing. While the third phase may be too drastic, phases one and two appear to be far more equitable than the current situation, where first-time EEO offenders have been hit with huge fines, reporting conditions and short-term renewals, simply because their records could not substantiate their recruitment efforts.

The Commission's policy has always been to lead licensees into compliance. As the Commission has recognized:

In accord with the usual common sense principle expressed in Title VII of avoiding litigation where possible, where we believe that a licensee has merely failed to take sufficient steps to ensure equal employment opportunities for minorities and women, our preferred solution has been to order the licensee to take immediate corrective steps and to monitor its future affirmative action efforts. . . . We propose to continue this practice.<sup>34</sup>

Enforcement under the *Policy Statement* runs counter to this common sense principle.

#### IV. **THE COMMISSION SHOULD PROVIDE RELIEF FOR SMALL BROADCASTERS, THE VAST MAJORITY OF WHOM HAVE FEW EMPLOYEES AND LIMITED RESOURCES.**

The *Notice* invites comment regarding how the Commission's EEO policies can reflect the concerns of small market broadcasters, who by and large have unique difficulties in attracting and retaining minority employees because of their location.<sup>35</sup> In addition, the *Notice* seeks guidance as to how to define and identify "small market broadcasters."

In this regard, NAB urges the Commission to provide relief to at least two classes of broadcasters: those whose main studio is located in a predominantly rural area, and "small"

---

<sup>34</sup> 1976 *Report and Order*, *supra* note 14, at 228 n.4.

<sup>35</sup> *Notice*, *supra* note 2, ¶ 21.

broadcasters (i.e., those with fewer than 15 fulltime employees) who serve all types of markets. Both face similar problems in recruiting and retaining qualified employees, including women and minorities. NAB believes it would be appropriate to relieve such stations from the burden of demonstrating their efforts to attract female and minority applicants, so long as there is no history of discrimination.

**A. Broadcasters in Small Markets Experience Difficulties in Attracting and Retaining Qualified Personnel, Including Minorities.**

NAB recommends that the Commission adopt a "small market" definition similar to that provided under the statute exempting a station serving primarily rural areas from paying overtime to its announcers, newspeople and chief engineer.<sup>36</sup> This statute provides the overtime exemption for stations whose main studio is located (a) outside a Metropolitan Statistical Area ("MSA"), (b) inside an MSA of less than 100,000 population, or (c) in a community of less than 25,000 population and at least 40 miles from the principal city of the MSA. These areas often lack the types of amenities which would attract applicants from other locales, generally have a small local labor force from which stations may recruit, and are likely to have little, if any, public transportation which would allow employees and applicants to commute great distances in order to reach the station.

There is no question that small market broadcasters have acute difficulties in attracting and retaining qualified women and minorities. As the Commission has noted, "small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field."<sup>37</sup> But these entry-level positions are generally low-paying jobs.

---

<sup>36</sup> 29 U.S.C. § 213(b)(9).

<sup>37</sup> *Report and Order*, *supra* note 19, at 3970 ¶ 22.

The 1992 NAB Radio Employee Compensation and Fringe Benefits Report ("1992 NAB Report")<sup>38</sup> shows that in communities of less than 25,000 population, the average starting annual salary for fulltime employees who were not department heads ranged from \$10,208 for a copywriter to \$15,150 for a farm reporter. Average compensation for all such employees ranged from \$12,000 for a sports reporter to \$17,171 for a farm reporter.<sup>39</sup> Based on a 40-hour week, the average compensation ranges from \$5.77 to \$8.26 per hour, barely above minimum wage. Moreover, 38 percent of the stations responding to the survey provide no hospitalization insurance.<sup>40</sup> The figures do not improve much even in markets ranging up to 100,000 population: the averages range from \$13,254 for a sports reporter to \$20,873 for a farm reporter. And, while benefits are somewhat better, the vast majority provide little more than basic hospitalization, surgical and major medical.<sup>41</sup>

Low pay and meager benefits make small market stations unattractive to recent college graduates, who are most likely to be qualified for management-level positions. The situation at Betap Broadcasting in Princeton, West Virginia, is fairly typical of small markets throughout the country.<sup>42</sup> There, most jobs in the market pay minimum wage; the station can afford to pay only slightly above minimum — up to \$5.50 per hour. The low salaries offered in the area drive away most college graduates. Thus, the labor market in the Princeton area generally contains few individuals with the education and training for management positions.

---

<sup>38</sup> Relevant portions of the 1992 NAB Report are attached as Appendix A.

<sup>39</sup> 1992 NAB Report at Table XVI.

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*, Table XIV.

<sup>42</sup> Comments of Betap Broadcasting, Inc. in MM Docket No. 94-34, filed May 18, 1994, at 3.

Moreover, many small market broadcasters must compete with huge companies for workers — including women and minorities — in the general labor force. For example, one broadcaster in San Angelo, Texas, has noted that its competition includes Levi Strauss, GTE and Johnson & Johnson.<sup>43</sup> It is impossible for most small market broadcasters to offer the same wages and benefits available from these large, international corporations.

In addition, because small market jobs of all types are considered “entry level,” it is often more difficult for small market broadcasters to attract personnel from larger markets, even for management positions. The natural tendency in career advancement is to begin in small markets and move up to larger markets, not vice versa.<sup>44</sup> And again, salary and benefits are less attractive in small markets. For example, most program directors begin their careers as on-air personalities. The average base salary for radio program directors in markets of less than 25,000 population is \$15,859.<sup>45</sup> The average on-air radio personality in a 25,000-50,000 market earns \$15,493,<sup>46</sup> and in a 50,000-100,000 market the average is \$15,618.<sup>47</sup> For many would-be applicants, the modest increase in salary and authority is often more than offset by decreased benefits and less opportunity for advancement to larger markets.

For many applicants — particularly those who owe thousands of dollars in college loans — the low pay and sparse benefits associated with small market broadcasting are not attractive. Thus, small market broadcasters generally have problems attracting qualified applicants.

---

<sup>43</sup> Comments of Earshot Broadcasting, Inc. in MM Docket No. 94-34, filed May 23, 1994, at 3.

<sup>44</sup> See Comments of La Paz Broadcasting, Inc., filed May 17, 1994, at 5.

<sup>45</sup> See 1992 NAB Report, *supra* note 39, Table XVI.

<sup>46</sup> See *id.*, Table XV.

<sup>47</sup> See *id.*, Table XIV.

The Commission should provide these stations with relief by not scrutinizing their recruitment efforts so long as the stations have no history of discrimination. For these stations in particular, formalized efforts should be secondary. By relieving such stations of overly burdensome recordkeeping requirements, the Commission would allow them to devote more resources to serving the public through their programming.

**B. Small Operations in Larger Communities Also Have Problems Competing for Qualified Personnel.**

NAB urges the Commission to provide relief not only for small market broadcasters, but for small broadcasters in medium and larger markets as well. Such broadcasters face the same types of employment problems as those in small markets. Most have inadequate financial and personnel resources to conduct the extensive self-assessment and recordkeeping required for compliance under the *Policy Statement*. Like their small market counterparts, small broadcasters generally have only one or two people who handle personnel matters, and not as a fulltime job. Many general managers do more than "just mind the store" — they also have sales or on-air obligations, as well perform hands-on technical functions.

Most of these stations face high turnover rates. They train and develop on-air and off-air personnel who frequently jump to larger stations for more money and/or better benefits. Unwieldy recordkeeping can place an undue hardship on these operations by diverting management and other personnel resources away from the primary function of the station — to program in the public interest.

Medium and large market stations which have fewer than 15 fulltime employees should be given the same treatment under the Commission's EEO regulations as NAB has proposed for small market stations. Such stations should be exempt from onerous EEO recordkeeping so long as there is no history of discrimination.

Establishing a 15-employee threshold for "small" broadcasters would be consistent with similar programs of other agencies. The employment provisions of the Americans with Disabilities Act currently apply to employers with 25 or more employees, 15 or more beginning July 26, 1994.<sup>48</sup> Title VII of the Civil Rights Act has a 15-employee threshold,<sup>49</sup> and the benchmark for the Age Discrimination in Employment Act is 20 employees.<sup>50</sup> A 15-employee threshold for recruitment recordkeeping seems appropriate for the Commission's EEO program as well.

In addition, NAB recommends that the Commission raise the threshold for written EEO programs for such broadcasters from the current five percent of aggregate minorities in the labor force to ten percent. In many markets, less than ten percent minority representation in the labor force translates into an incredibly small minority labor force. For example, the Enid, Oklahoma, MSA has a labor force of 28,200 workers,<sup>51</sup> 7.5 percent of which are minorities.<sup>52</sup> Thus, there are only 2,115 minorities in the labor force of a market which has at least five different licensees.<sup>53</sup> The South Bend, Indiana, MSA has 131,000 workers in its labor force,<sup>54</sup> 11.4 percent of which are minorities.<sup>55</sup> The South Bend market has 14,934 minorities in its labor

---

<sup>48</sup> Pub. L. No. 101-336, 104 Stat. 327 (1990).

<sup>49</sup> Pub. L. No. 88-352, 78 Stat. 253 (1964), *as amended*, Pub. L. No. 92-261, 86 Stat. 103 (1972).

<sup>50</sup> Pub. L. No. 90-202, 81 Stat. 602 (1967).

<sup>51</sup> See Bureau of Labor Statistics, *Employment and Earnings* (Dec. 1992) at 132.

<sup>52</sup> 1990 Census Data Summary Report (P)MSA Total Percentages for Total Civilian Labor Force, March 31, 1993, at 4.

<sup>53</sup> See *Broadcasting and Cable Yearbook 1994* at B-298 and C-56.

<sup>54</sup> *Employment and Earnings*, *supra* note 51, at 130.

<sup>55</sup> 1990 Census Summary, *supra* note 52, at 12.

force and at least nine different licensees.<sup>56</sup> These stations must also compete with large, non-broadcast corporations which generally are able to offer better compensation and benefits.

The Commission should also provide small broadcasters greater latitude in using alternative labor force data rather than MSA data. Small broadcasters often are located outside the principal community of the MSA. Their signals frequently do not have great penetration into the principal city, thus their coverage area often has vastly different demographic characteristics than that of the remainder of the MSA. Still, these stations are usually held to the same employment standards as stations located within the principal city. The Commission originally stated that stations may use alternative labor force data where: 1) the distance of the station from areas with significant minority population in the MSA is great; 2) commuting from those areas to the station is difficult; or 3) recruitment efforts directed at the MSA minority labor force have been fruitless.<sup>57</sup> However, instead of granting use of alternative data if only one of the criteria is met, the Commission has chosen to apply the criteria as a three-prong test, thus forcing licensees to satisfy all three criteria.<sup>58</sup> The result has been that the Commission has almost always disallowed the use of alternative labor force data. Most recently, the Commission rejected an alternative labor force argument in the case of a station located 20 miles from its MSA's principal city, even though less than 25 percent of the station's staff commuted more than 20 miles and only one of the station's 14 employees lived within the central city of the MSA.<sup>59</sup>

---

<sup>56</sup> See *Broadcasting and Cable Yearbook 1994* at B-129 and B-130, and C-26.

<sup>57</sup> See *Report and Order*, *supra* note 19, at 3973 ¶ 41.

<sup>58</sup> See, e.g., *National Capital Christian Broadcasting*, *supra* note , at 1922 n.9; *Gulf Atlantic Media Corporation*, 8 FCC Rcd. 603, 604 ¶ 7 (1992).

<sup>59</sup> *Buckley Broadcasting Corporation (WSEN(AM)/WSEN-FM)*, FCC 94-108, adopted April 20, 1994, released April 28, 1994, at 5-6.



The use of labor force data is important not only for the staff profile, but also in recognizing the "dominant" minority group within the station's labor force. As noted above, "each licensee must determine the most appropriate means of carrying out its EEO program based on the characteristics of the station and *its local service area*" (emphasis added).<sup>60</sup> Yet, the Commission rarely recognizes the labor force of the local service area, systematically opting for use of MSA data.

NAB urges the Commission to treat the alternative labor force criteria as distinct factors rather than a three-prong test. Licensees should be able to satisfy any one of the criteria in order to use alternative labor force data. In the alternative, such data should be allowed if the station does not put a city-grade signal over at least 50 percent of the MSA's central city. Such relief would allow many small broadcasters to depict more accurately the actual labor force from which they may attract applicants.

In addition, the Commission should be more cognizant of the characteristics of a station's local labor force. Often, stations in largely agricultural or blue-collar areas face extreme difficulty in filling managerial and technical positions from the local labor force. As D.C. Circuit Judge Lawrence Silberman recently noted, "It seems quite reasonable to suggest that migrant agricultural workers — again minority or white — will normally be less suitable for white collar or technical jobs in a radio station."<sup>61</sup> The Commission should consider such data when examining possible deficiencies in licensees' EEO programs.

---

<sup>60</sup> See note 23, *supra*.

<sup>61</sup> *Florida State Conference of Branches of the NAACP v. FCC*, *supra* note 10, at 7.